

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 WILLIAM ERRICO, et al.

Case No. 2:16-cv-01159-APG-NJK

5 Plaintiffs,

ORDER DISMISSING CASE

6 v.

7 STATE BAR OF NEVADA, *et al.*,

(ECF No. 62)

8 Defendants.
9

10 The parties are familiar with the factual background and procedural history of this case, so
11 I will not repeat them here. In short, I previously dismissed the Complaint filed by plaintiffs
12 William Errico and his law firm, but gave them leave to amend to try to fix the defects. They
13 filed a First Amended Complaint but that, too, is fatally defective. I therefore dismiss this case.

14 Errico is the subject of an on-going disciplinary action by the State Bar of Nevada. He
15 has sued the Bar and its former Bar Counsel (David Clark), asserting that Clark improperly
16 shared information about him and his disciplinary action with a lawyer (James Christensen) who
17 was representing some of Errico's former clients in malpractice suits against him. Errico's
18 original Complaint alleged that Clark and the Bar operated a secret "Shadow Network" of
19 lawyers hand-picked by Clark to file malpractice suits against targeted lawyers being investigated
20 by the Bar.¹ Errico has dropped that theory, but now alleges that Clark—through the Bar or
21 Christensen—is operating a RICO enterprise to extort and defraud Errico through the attorney
22 disciplinary process and legal malpractice suits.² Errico also asserts a state law claim of invasion
23 of privacy against Clark and a claim under 42 U.S.C. § 1983 against both Clark and the Bar.³

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26 ¹ ECF No. 1 at 4.

27 ² ECF No. 59 at 21-26.

28 ³ *Id.* at 19-21.

1 The Bar and Clark move to dismiss the First Amended Complaint.⁴ The Bar is not a
2 “person” amenable to suit under § 1983 and it is immune under the Eleventh Amendment. As to
3 Clark, Errico fails to allege a violation of a constitutional right, so he cannot maintain his § 1983
4 claim. Nor can he show that Clark’s actions proximately caused Errico’s injuries, which negates
5 his RICO claim. I therefore dismiss Errico’s federal claims in his First Amended Complaint and
6 decline to exercise supplemental jurisdiction over his state law claim.

7 **I. ANALYSIS**

8 **A. Legal Standards**

9 A properly pleaded complaint must provide a “short and plain statement of the claim
10 showing that the pleader is entitled to relief.”⁵ While Rule 8 does not require detailed factual
11 allegations, it demands more than “labels and conclusions” or a “formulaic recitation of the
12 elements of a cause of action.”⁶ “Factual allegations must be enough to rise above the speculative
13 level.”⁷ To survive a motion to dismiss, a complaint must “contain[] enough facts to state a claim
14 to relief that is plausible on its face.”⁸

15 District courts must apply a two-step approach when considering motions to dismiss.⁹
16 First, the court must accept as true all well-pleaded factual allegations and draw all reasonable
17 inferences from the complaint in the plaintiff’s favor.¹⁰ Legal conclusions, however, are not
18 entitled to the same assumption of truth even if cast in the form of factual allegations.¹¹ Mere
19 recitals of the elements of a cause of action, supported only by conclusory statements, do not
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22 ⁴ ECF No. 62.

23 ⁵ FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

24 ⁶ *Ashcraft v. Iqbal*, 556 U.S. 662, 678 (2009).

25 ⁷ *Twombly*, 550 U.S. at 555.

26 ⁸ *Iqbal*, 556 U.S. at 696 (internal quotation marks and citation omitted).

27 ⁹ *Id.* at 679.

28 ¹⁰ *Id.*; *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir. 2013).

¹¹ *Iqbal*, 556 U.S. at 679; *Brown*, 724 F.3d at 1248.

1 suffice.¹² Second, the court must consider whether the factual allegations in the complaint allege
2 a plausible claim for relief.¹³ A claim is facially plausible when the complaint alleges facts that
3 allow the court to draw a reasonable inference that the defendant is liable for the alleged
4 misconduct.¹⁴ Where the complaint does not permit the court to infer more than the mere
5 possibility of misconduct, the complaint has “alleged—but it has not shown—that the pleader is
6 entitled to relief.”¹⁵ When the claims have not crossed the line from conceivable to plausible, the
7 complaint must be dismissed.¹⁶ “Determining whether a complaint states a plausible claim for
8 relief will . . . be a context-specific task that requires the [district] court to draw on its judicial
9 experience and common sense.”¹⁷

10 **B. Section 1983 claims**

11 I previously ruled that Clark in his official capacity and the Bar are not “persons” for
12 purposes of 42 U.S.C. § 1983.¹⁸ Errico again asserts a § 1983 claim against the Bar, but now also
13 sues Clark in his individual capacity.¹⁹

14 This court has long held that the Bar is not a “person” under § 1983,²⁰ and that the Bar is
15 immune from suit under the Eleventh Amendment.²¹ Thus, Errico’s § 1983 claim against the Bar
16 is dismissed with prejudice.²²

18 ¹² *Iqbal*, 556 U.S. at 678.

19 ¹³ *Id.* at 679.

20 ¹⁴ *Id.* at 663.

21 ¹⁵ *Id.* at 679 (internal quotation marks and citation omitted).

22 ¹⁶ *Twombly*, 550 U.S. at 570.

23 ¹⁷ *Iqbal*, 556 U.S. at 679.

24 ¹⁸ ECF No. 38 at 25.

25 ¹⁹ ECF No. 59 at 2-3.

26 ²⁰ *O’Connor v. State of Nev.*, 507 F. Supp. 546, 550 (D. Nev. 1981).

27 ²¹ *Id.*

28 ²² Errico attempts to avoid dismissal of his claim against the Bar by asserting he has “pled sufficiently for injunctive relief.” ECF No. 63 at 22-23. However, Errico does not request injunctive relief in his First Amended Complaint. *See* ECF No. 59 at 26-27 (seeking only monetary damages). Moreover, Errico fails to explain what injunctive relief he could request.

1 As to Clark, it is possible for Errico to assert a § 1983 claim against him in his personal
2 capacity.

3 State officers sued for damages in their official capacity are not “persons” for
4 purposes of the suit because they assume the identity of the government that
5 employs them. . . . By contrast, officers sued in their personal capacity come to
6 court as individuals. A government official in the role of personal-capacity
7 defendant thus fits comfortably within the statutory term “person.”²³

8 However, Errico has not asserted a plausible § 1983 claim against Clark because he has failed to
9 allege a violation of a constitutional right that would support that claim.

10 Although Errico claims his right to financial privacy was violated, he cites no authority
11 recognizing a constitutionally protected right to privacy in financial records. He bases his claim
12 on Nevada Supreme Court Rule 121(1), which provides that “[a]ll proceedings involving
13 allegations of misconduct by an attorney shall be kept confidential until the filing of a formal
14 complaint.” However, Supreme Court Rule 121(16) states that “[t]hese rules shall not prohibit
15 any complainant, the accused attorney, or any witnesses from discussing publicly the existence of
16 the proceedings under these rules or the underlying facts related thereto.” Indeed, instances could
17 arise when the Bar or Bar Counsel should disclose disciplinary concerns in order to protect the
18 public (e.g., discovery of an on-going fraud committed by a lawyer against his clients) or to refer
19 a client/victim to another lawyer who can protect the victim’s rights. Regardless, Errico has not
20 demonstrated the violation of a constitutionally protected right to financial privacy.

21 Nor have Errico’s procedural due process rights been violated. Clark is not prosecuting
22 Errico in the Bar’s pending disciplinary proceeding, so he is not an “interested prosecutor.”²⁴ In
23 fact, Clark no longer works for the Bar so he would not be involved any further. The Bar’s
24 disciplinary proceedings against Errico apparently have not concluded, and Errico proffers
25 nothing to suggest that those proceedings will not be fair with Clark no longer participating.

26 Clark is no longer employed by the Bar, and thus can no longer engage in the alleged conduct
27 Errico complains of. There is no conduct to enjoin prospectively.

28 ²³ *Hafer v. Melo*, 502 U.S. 21, 27 (1991).

²⁴ ECF No. 63 at 15-19; ECF No. 59 at 19.

1 Errico also alleges a deprivation of his substantive due process rights. Substantive due
2 process protects individuals from action by the government that “shocks the conscience.”²⁵ The
3 bar to prove such a claim is very high. “[I]n order to establish a constitutional violation based on
4 substantive due process, [a plaintiff] must show both a deprivation of her [life, property, or]
5 liberty and conscience shocking behavior by the government.”²⁶ It does not shock the conscience
6 that the Bar or Bar Counsel would assist victims of attorney malpractice to protect themselves and
7 enforce their rights by referring them to private attorneys. Errico alleges that Clark provided
8 financial records to Christensen, which were subsequently used in malpractice cases against
9 Errico. Even if true, that does not shock the conscience. Moreover, Christensen could have
10 obtained those same documents through the discovery process in the malpractice cases. And
11 Errico gave his financial documents directly to at least one of his client/victims.²⁷ Errico’s
12 allegations that Clark received kickbacks from Christensen for providing Errico’s financial
13 information are conclusory and lack plausible factual allegations.²⁸ Those allegations do not rise
14 above the level of speculation.²⁹

15 Finally, in his opposition to the motion to dismiss, Errico attempts to renew his equal
16 protection claim that I dismissed previously.³⁰ Yet nowhere in the First Amended Complaint
17 does Errico assert an equal protection violation as a basis for his § 1983 claim, so he cannot raise
18 it in an opposition to a motion. But even if I consider Errico’s putative equal protection claim, it
19 fails on its merits. Errico has never been able to identify a protected class of which he is a

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21 ²⁵ *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006) (citation omitted).

22 ²⁶ *Id.* Even the case cited by Errico, *United States v. Russell*, holds that a violation of
23 substantive due process occurs only when an act violates “that fundamental fairness, shocking to
the universal sense of justice, mandated by the Due Process Clause” 411 U.S. 423, 431-32
(1973) (citation omitted).

24 ²⁷ ECF No. 62-3 at 3, 11, 21; ECF No. 62-4 at 2-4.

25 ²⁸ Clark denies under oath that he received kickbacks from Christensen or referred
26 pending discipline matters to counsel for fees. ECF No. 12-2 at 3; ECF No. 62-2 at 3. However, I
cannot rely on those denials in deciding the motion to dismiss.

27 ²⁹ *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 679.

28 ³⁰ ECF No. 63 at 20-21.

1 member for purposes of equal protection analysis.³¹ Instead, Errico now claims that he is a “class
2 of one.”³² The case Errico relies on for this proposition, *Engquist v. Oregon Dep’t. of*
3 *Agriculture*, cautioned against expanding this legal theory too far. 478 F.3d 985, 994-96 (9th Cir.
4 2007). A court should not extend the “class of one” theory where “the need for federal judicial
5 review under equal protection ‘is especially thin,’” or where doing so would either upset or
6 transform long-standing law or practices or “generate a flood of new cases.” *Id.* at 995. As in
7 *Engquist*, I find the “class of one” theory “too slender a reed on which to base” Errico’s putative
8 equal protection claim. *Id.* at 996.

9 Based on my judicial experience and common sense, Errico’s § 1983 claim does not cross
10 the line from possible to plausible.³³ I therefore dismiss it.

11 C. RICO claim

12 Errico’s RICO claim against Clark is fatally defective because he cannot show any
13 damages proximately caused by Clark’s alleged actions.

14 A violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a
15 pattern (4) of racketeering activity. . . . In addition, the plaintiff only has standing
16 if, and can only recover to the extent that, he has been injured in his business or
property by the conduct constituting the violation.³⁴

17 The injury suffered must have been proximately, that is “directly,” caused by the predicate acts.³⁵
18 Here, Errico cannot show that he suffered any damages directly caused by Clark’s actions.³⁶

20 ³¹ ECF No. 38 at 25-26.

21 ³² ECF No. 63 at 20-21.

22 ³³ *Iqbal*, 556 U.S. at 679.

23 ³⁴ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

24 ³⁵ *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266-268 (1992); *Hemi*
Grp., LLC v. City of New York, N.Y., 559 U.S. 1, 18 (2010); *Anza v. Ideal Steel Supply Corp.*, 547
25 U.S. 451, 456-457 (1991).

26 ³⁶ Preliminarily, it is unclear whether Errico has suffered any concrete damages. It
27 appears he did not pay any money to settle the malpractice case filed by his client/victim Deeann
28 Clark that was based on her underlying medical malpractice claim. ECF No. 62-7. He apparently
suffered no damages regarding Letricia Robinson as she did not file a malpractice claim against
Errico. Rather, Errico filed an interpleader action naming Robinson as a potential claimant to
funds in Errico’s possession. Lacking any concrete damages, Errico would not have standing to

1 Errico claims that Clark—somehow through Christensen—forced Errico “to choose between
2 settling the malpractice claims and losing his law license. Errico’s damages were directly caused
3 by being unlawfully forced by Clark to choose between his law license and continuing to fight the
4 malpractice claims, which is the very type of Hobsons’s choice prohibited by the Hobbs Act.”³⁷
5 First, there are no plausible factual allegations showing that “Christensen made these threats
6 under the direction and control and at the behest of Clark.”³⁸ Such conclusory allegations are
7 insufficient and speculative.³⁹

8 Moreover, Errico’s contention that he faced a Hobson’s choice is not plausible. The Bar’s
9 disciplinary proceedings are independent of any civil malpractice action. “[T]he violation of
10 professional rules of responsibility does not create a private right of action.”⁴⁰ And payment of a
11 settlement in a civil malpractice claim does not preclude a disciplinary proceeding. Nor should it,
12 as an attorney who violates rules of professional conduct should be subject to discipline, in order
13 to protect the public.

14 The public interest therefore requires that in the securing of professional advice
15 and assistance upon matters affecting one’s legal rights one must have assurance
of competence and integrity

16 It is to meet the requirements of public interest that high standards of
17 training and competence are fixed for those who would practice law and that they
practice under a strict code of professional ethics and are made answerable to the
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21 assert a RICO claim. *Holmes*, 503 U.S. at 279 (O’Connor, concurring in part) (The plaintiff must
22 “have suffered injury in fact. . . . [And RICO’s civil remedies are confined] to those whom the
defendant has truly injured in some meaningful sense.”).

23 ³⁷ ECF No. 63 at 11.

24 ³⁸ ECF No 59 at 13, 14.

25 ³⁹ *Iqbal*, 556 U.S. at 663.

26 ⁴⁰ *Mainor v. Nault*, 101 P.3d 308, 320 (Nev. 2004), *as corrected on denial of reh’g* (Apr.
27 13, 2005). *Cf.*, Nevada Supreme Court Rule 108 (“Before or after a grievance file has been
28 opened, processing of a grievance or complaint shall not be deferred or abated because of
substantial similarity to the material allegations of pending criminal or civil litigation, unless
authorized, for good cause”).

1 courts as court officers for the manner in which they meet their professional
obligations.⁴¹

2 Errico would face disciplinary proceedings regardless of the outcome of the malpractice cases
3 filed against him. The allegation of a Hobson's choice is contradicted by the facts.

4 Further, Clark's alleged providing of financial records to Christensen was not the
5 proximate cause of Errico's alleged injury because Christensen could have obtained those records
6 through discovery. And Errico gave his financial documents directly to at least one of his
7 client/victims.⁴² Because Christensen could have obtained the information without Clark's help,
8 it would be impossible to determine whether Errico would have settled the malpractice cases (and
9 for how much) had Christensen obtained the documents on his own. This is one of the reasons a
10 RICO plaintiff must prove direct causation, because "the less direct an injury is, the more difficult
11 it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct
12 from other, independent, factors."⁴³ The requirement of provable, direct causation between the
13 act and the harm avoids "the speculative nature of the proceedings that would follow if" the
14 plaintiff is allowed to proceed without it.⁴⁴ "The element of proximate causation recognized in
15 *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO
16 litigation."⁴⁵

17 In *Bastian v. Petren Resources Corporation*, the plaintiffs alleged that they purchased
18 interests in oil and gas partnerships based on the defendants' misrepresentations.⁴⁶ But the
19 complaint did not allege that the misrepresentations or other fraudulent conduct caused those
20 partnership interests to eventually become worthless. The court thus found that the plaintiffs
21 could not show their losses were caused by the alleged RICO violations. "If the plaintiffs would
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23 ⁴¹ *Pioneer Title Ins. & Tr. Co. v. State Bar of Nev.*, 326 P.2d 408, 410 (Nev. 1958).

24 ⁴² ECF No. 62-3 at 3, 11, 21; ECF No. 62-4 at 2-4.

25 ⁴³ *Holmes*, 503 U.S. at 269.

26 ⁴⁴ *Anza*, 547 U.S. at 459-60.

27 ⁴⁵ *Id.*

28 ⁴⁶ 892 F.2d 680 (7th Cir. 1990).

1 have lost their shirts in the oil and gas business regardless of the defendants' violations of RICO,
2 they have incurred no loss for which RICO provides a remedy."⁴⁷

3 Here, there is no direct causation between Clark's alleged actions and Errico's alleged
4 damages. Because Christensen could have obtained the financial information through discovery,
5 and because Errico gave some of the information to his own client, it is impossible to say which
6 damages, if any, were directly caused by Clark. Rather, the direct cause of Errico's damages was
7 Errico's own actions that led to malpractice claims against him. Because Errico cannot show he
8 suffered any damages proximately caused by Clark, he cannot maintain a federal RICO claim
9 under 18 U.S.C. § 1962.⁴⁸

10 **D. Invasion of privacy claim**

11 Errico's remaining claim (invasion of privacy) arises under state law, and that claim is
12 before me under supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). I may decline to
13 exercise supplemental jurisdiction over a state law claim if I have dismissed all claims over which
14 this court has original jurisdiction.⁴⁹ In doing so, I consider whether continuing to exercise
15 supplemental jurisdiction promotes economy, convenience, fairness, and comity.⁵⁰ Whether to
16 decline the exercise of supplemental jurisdiction under § 1367(c) lies within my discretion.⁵¹

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19 ⁴⁷ *Id.* at 686.

20 ⁴⁸ The Bar also argues that Errico cannot prove that any of the alleged RICO enterprises
21 (as opposed to the predicate acts) had the requisite effect on interstate commerce to support a
22 RICO claim. *Musick v. Burke*, 913 F.2d 1390, 1398 (9th Cir. 1990) ("plaintiffs must demonstrate
23 that the enterprise which is involved in or benefits from the racketeering activity is one engaged
24 in, or having an effect on, interstate commerce"). Errico alleges three potential enterprises: the
25 Bar, Christensen ("under the direction and control of Clark"), and "Clark and Christensen [as] an
association-in-fact enterprise." ECF No. 63 at 12-13. Given my dismissal of the RICO claim on
other grounds, I decline to address this issue. Similarly, I express no opinions on whether the
Bar, Clark, or the Clark/Christensen association-in-fact allegations are sufficient to prove the
existence of an enterprise, or whether Errico could maintain a state RICO claim under Nevada
law.

26 ⁴⁹ 28 U.S.C. § 1367(c)(3).

27 ⁵⁰ *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997).

28 ⁵¹ *Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1090 (9th Cir. 2008).

1 I have dismissed the two claims supporting original jurisdiction in this court. The
2 remaining claim raises issues of Nevada state law, including the duties imposed under the Nevada
3 Supreme Court Rules, and confidentiality and immunity regarding attorney disciplinary
4 proceedings.⁵² The interpretation of those Rules, and the potential liability under Nevada law of
5 the state Bar and its former Bar Counsel, are issues best resolved by the Nevada courts.
6 Discovery in this case has been stayed and the case has not progressed so far that concerns about
7 economy or convenience are implicated.⁵³ Errico's state law claim should be resolved by the
8 state court. I therefore decline to exercise supplemental jurisdiction over Errico's claim of
9 invasion of privacy.

10 II. CONCLUSION

11 IT IS THEREFORE ORDERED that the defendants' motion to dismiss (**ECF No. 62**) is
12 **GRANTED**. The claim against the State Bar of Nevada is dismissed with prejudice. The § 1983
13 and RICO claims against Clark are dismissed without prejudice. I decline to exercise
14 supplemental jurisdiction over the state law claim against Clark. This case is dismissed. The
15 clerk of the court is directed to enter judgment accordingly.

16 Dated: September 28, 2017.



18 ANDREW P. GORDON
19 UNITED STATES DISTRICT JUDGE

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24 ⁵² Clark contends that Nevada Supreme Court Rule 106(1) provides him absolute
25 immunity from liability for civil suits regarding actions taken in connection with disciplinary
26 proceedings. I express no opinion whether, taking Errico's allegations as true, Clark's alleged
27 providing of bank records to Christensen was done in connection with, or outside of, Errico's
28 disciplinary proceedings. I need not reach this issue as I decline to exercise supplemental
jurisdiction over this claim.

⁵³ ECF No. 74.